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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 500

MICHAEL H. PARISH, DOING BUSINESS UNDER THE NAME AND STYLE OF ALLEGHENY ASPHALT & PAVING COMPANY,
Petitioner,

vs.

THE UNITED STATES,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Michael H. Parish, doing business under the name and style of Allegheny Asphalt and Paving Company, by his attorneys, Godfrey L. Munter and Charles H. Sachs, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims in the above entitled case entered on July 9, 1951 (motion for rehearing and new trial denied October 2, 1951).

Jurisdiction

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1255 (1). Jurisdiction of the

United States Court of Claims was based on Title 28, United States Code, Section 1491 (1), (2) and (4).

Relevant Parts of Statutes Involved

The question as to the extent to which this Court will now review the findings of fact made by the Court of Claims arises under the new Section 1255 of Revised Title 28, United States Code, reading as follows:

> "S. 1255, Cases in the Court of Claims may be reviewed by the Supreme Court by the following methods:
> (1) By Writ of Certiorari granted on petition of the United States or claimant,—"

The above quoted section repeals, effective September 1, 1948, the former statute specifically granting the Court the authority to review findings of fact, which read as follows:

Act of May 22, 1939, Chapter 140, Statutes at Large, 53 Stat. 752:

> "Be it Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, that Section 3, Subsection b, of the Act of February 13, 1925 (43 Stat. 936,939, c. 229; U. S. Code, Title 28, sec. 288 b), be amended so as to read as follows:
>
> "(b) In any case in the Court of Claims, including those begun under section 180 of the Judicial Code, it shall be competent for the Supreme Court, upon the petition of either party, whether Government or claimant, to require by certiorari, that the cause be certified to it for review and determination of all errors assigned, with the same power and authority, and with like effect, as if the cause had been brought there by appeal.
>
> "In such cases the Supreme Court shall have authority to review, in addition to other questions of law,

errors assigned to the effect that there is a lack of substantial evidence to sustain a finding of fact; that an ultimate finding or findings are not sustained by the findings of evidentiary or primary facts; or that there is a failure to make any finding of fact on a material issue."

Summary and Statement of Matter Involved

Petitioner seeks a review by this Court of a judgment entered by the Court of Claims on July 9, 1951, dismissing his petition for damages of $188,551.53, sustained by him on account of respondent's failure to issue, when agreed upon, or at a reasonable time, a Notice to Proceed with the paving of the Johnstown, Pennsylvania, airport, for which the parties had theretofore formally contracted. The Court of Claims held that respondent "should reasonably have issued Notice to Proceed effective April 15, 1944," (F. F. 54, R. 65); that notice was not issued till effective October 16, 1944, (F. F. 40, R. 60); and then only at the personal direction of the President of the United States (F. F. 35, R. 59); that petitioner's plant, equipment and organization was consequently tied up 300 days instead of 60 days (F. F. 47, R. 62) and as a result thereof petitioner suffered substantial damages (Decision R. 67; F. F. 29, R. 58; F. F. 44, R. 61; F. F. 47, R. 62).

The Court of Claims exculpates the government's failure to issue Notice to Proceed on account of the latter's alleged compliance with the so-called War Production Board Conservation Order L-41, as amended. In other words, the lower court held, in substance, that the Civil Aeronautics Administration, which executed the contract and with whom the petitioner dealt exclusively, was excused from issuing the Notice to Proceed on April 15, 1944, as agreed upon, because the War Production Board did not authorize the project until the following October.

Petitioner contends, in the main, that when the government entered into the formal contract, absolute and unconditional, such as is here involved, it occupied the same status as a private contracting party; that the effectiveness of the contract, and the rights of the parties, cannot be made contingent upon a condition not therein expressed. Petitioner further contends that the War Production Board had nothing to do with the contract, was not a party to it, and even if it did, the project involved here was not subject to the board's prior approval but was specifically exempted therefrom by its said Conservation Order L-41. In the alternative, petitioner takes the position that even if the board's prior approval of the project was necessary, it was the duty of the government to obtain such approval *before* it entered into the contract and exacted a performance bond from petitioner with a penalty of $400.00 a day, because the government's representative Glidden told petitioner at the time the bids were opened that the contract would not be awarded until such preference rating had been obtained from WPB by the CAA (F. F. 5, R. 43); later the same representative wrote to his superiors in Washington that:

"Award will be withheld pending receipt of rating."

Thereafter, during February and March, 1944, the same government representative actually met petitioner's brother and general manager on the site of the airport on at least three (3) occasions and after seeing the elaborate preparations made by petitioner to proceed with the work "stated to Parish that he expected the Notice to Proceed to be issued between the 1st and 15th of April" (F. F. 23, R. 55), but he studiously avoided telling Parish that CAA did not intend to issue Notice to Proceed until the project was *approved as to essentiality* by WPB, although petitioner knew that as to critical materials, if any were needed, CAA

had to obtain a *preference rating* for same, because CAA had written him on November 15, 1943, when notice of award of contract was given, that

> "work not involving critical materials shall be commenced upon receipt of Notice to Proceed" (F. F. 8, R. 45).

Furthermore by his statements and conduct incident to these visits, Glidden naturally led petitioner to believe, by not mentioning preference ratings, that all formalities as to these matters had been attended to by CAA between the time of the writing of the above letter and the visits to the airport in the spring of 1944. Approval as to essentiality of the project on the one hand, and obtaining preference ratings for critical materials on the other hand, have nothing to do with each other; they are two separate and distinct propositions, just as different as night and day.

On top of that, the contention that the project was subject to the prior approval by the War Production Board only enters the case due to the improper admission in evidence, and consideration by the court, of a contract (in the form of an accepted resolution, not disclosed to petitioner until the trial of the case) between the government and the City of Johnstown, Pennsylvania (F. F. 3, R. 43), providing that all improvements should belong to that City. This contract, to which petitioner is not a party and which was at all times objected to when offered in evidence (R. 70-73), vests title to the project in the City of Johnstown, whereas the Contract between petitioner and the government provides that:

> "All material and work covered by partial payments" (which the record shows were made) "shall thereupon become the property of the government" (F. F. 10, R. 45).

As said Conservation Order L-41 expressly exempts from its operation "Construction owned by—Civil Aeronautics Authority" it can readily be seen that but for the City of Johnstown contract, the question of the applicability of War Production Board regulations would never have entered the case at all.

Then too, the court below, who did not see or hear any witnesses, without any discussion or stated reason therefor, not only totally disregarded and ignored the crucial finding of fact made on this point by its previously appointed commissioner, but made a finding, sua sponte, just opposite from that of the commissioner. The finding in point deals with the question whether petitioner was told, in December of 1943, by respondent's representative Glidden, that the project could not proceed until the War Production Board had approved it, and that the latter had disallowed it. Here are the two opposite findings:

1. Finding by Commissioner Hogenson (R. 29):

> "The evidence is not sufficient to find that Mr. Glidden so informed either the plaintiff or any responsible agent of the plaintiff."

2. Finding by Court of Claims (F. F. 16, R. 52):

> "—Glidden, by telephone, informed either plaintiff or some person in plaintiff's office that the WPB had denied the application for rating of the Johnstown Airport."

Furthermore, the Court of Claims made the following detrimental and conflicting findings, relating to additional items of losses (F. F. 47, R. 62):

> "With the allowance of the aforementioned 240 days (47 days for extra work), the contract was completed without delay in the total elapsed time of 300 days, during all of which time the plaintiff's machinery,

equipment, and organization were tied up on the contract project."

In the next breath (F. F. 48, R. 63) the lower court says:

> "There is no evidence of the amount of equipment, materials, or manpower used in the performance of the extra work."

On the basis of the last finding, the Court of Claims denied petitioner's damages for losses sustained on account of having his equipment and plant idle during the shut-down in the winter of 1944-1945, and on account of being required to do a disproportionate amount of extra work for which he was paid only about 3.3% of the main contract price, but which required 47/60ths of the main contract time.

Petitioner also contends that the Court of Claims erroneously substituted its own findings for those of the contracting officer. Articles 9 and 15 of the contract provide that all disputes involving questions of fact should be decided by the contracting officer—" whose decision shall be final and conclusive upon the parties thereto." In the instant case the contracting officer found (F. F. 47, R. 62):

> "By reason of the fact that approval of this project as to essentiality by the WPB was not received until approximately twelve (12) months after the opening of the bids—, it is believed that the difficulties encountered as a result of this delay could not have been foreseen or anticipated by your Company when submitting your bid."

The court below totally disregards and ignores this decision by the contracting officer, the final and conclusive judge of the facts, and denies petitioner's recovery with the statement that:

> "He proceeded at his own risk." (Decision R. 68.)

We will discuss hereafter in more detail, in the brief submitted with this petition, the foregoing erroneous findings; the lower court's failure to make findings on material issues, improper admissions in evidence of irrelevant and immaterial matter, as well as the facts of the case.

Questions Presented

1. The Court of Claims having found that the government "should reasonably have issued Notice to Proceed effective April 15, 1944", that on account of the government's failure to issue such Notice until effective October 16, 1944, the petitioner sustained extensive losses, did the Court of Claims err in denying damages for the recovery of such losses for the assigned reason that the project contracted for was subject to the prior approval of the War Production Board?

2. (a) Can the effectiveness of a contract, absolute and unconditional, and the right of petitioner to recover damages for its breach, be made contingent upon a condition not expressed in the contract, namely, the alleged necessity of the prior approval of the project by the War Production Board, not a party to the contract?

(b) Did the Court of Claims err in holding that the assumption by the Civil Aeronautics Administration that the project was subject to prior approval of the War Production Board constitutes a legal excuse for not issuing the Notice to Proceed when agreed upon?

(c) Did the Court of Claims err in assuming, without deciding, that it was necessary for the Civil Aeronautics Administration, the contracting agency, to obtain clearance of the project from the War Production Board?

3. Did the Court of Claims err in failing to pass upon the proper construction and interpretation of War Production Board Conservation Order L-41?

4. (a) Did the Court of Claims err in receiving and considering evidence highly prejudicial to petitioner and constantly objected to by him (R. 70-73), consisting principally of:

A. The previously undisclosed contract between the City of Johnstown, Pennsylvania, and the United States, entered into without the knowledge or consent of petitioner.

B. Interdepartmental correspondence between various agencies of the United States government, brought to the attention of the petitioner for the first time during the pendency of the suit.

(b) Is the contract between the parties here subject to the terms and conditions of the agreement between the government and the City of Johnstown, made without the knowledge or consent of petitioner?

5. Did the Court of Claims err in not holding that the government was estopped to deny liability in view of the finding by the contract officer, the final and conclusive judge as to delays and extensions under the terms of the contract, that (F. F. 47, R. 62):

"it is believed that the difficulties encountered as a result of this delay could not have been foreseen or anticipated by your Company?"

6. Did the Court of Claims err in not allowing damages sustained by petitioner on account of:

(a) Failure of the government to issue Notice to Proceed effective April 15, 1944.

(b) Eventually requiring petitioner to proceed with the project at a time when the government knew that on account of freezing weather the work could not be completed as a continuous operation and would unreasonably tie up peti-

tioner's plant and equipment for 300 days, instead of 60 calendar days, as specified in the contract.

(c) In requiring petitioner to do a grossly disproportionate amount of extra work without adequate compensation.

7. Will this Court, in reviewing a judgment of the Court of Claims, review the findings and evidence, as the Reviser's Notes seem to imply (Reviser's Notes appear after new Section 1255 of Title 28, United State Code) in accordance with the Act of May 22, 1939, Chapter 140, 53 Stat. 752, which amended the Act of February 13, 1925, c. 229, Sec. 3b and 3c; 43 Stat. 936, 939 (repealed by the Revision and Codification of Title 28 U. S. Code effective September 1, 1948, cf. new Section 1255 of new Title 28 U. S. Code), and which provided among other things that this Court shall have authority to review the Court of Claims' judgments for errors assigned to the effect:

(a) There is a lack of substantial evidence to sustain a finding of fact;

(b) That an ultimate finding or findings are not sustained by the findings of evidentiary or primary facts; and

(c) There is a failure to make any finding of fact on a material issue.

Reasons for Granting the Writ

The writ of certiorari should be granted for the following reasons:

1. The question of the applicability of orders of agencies such as the War Production Board, the Defense Production Authority, and the National Production Administration, to government contracts, absolute and unconditional on their face, is of great and vital importance to the pro-

fession, contractors and public at large. Contractors especially have a right to know whether they have a valid and enforceable contract and whether the government can defeat such contracts by never issuing Notice to Proceed at all. This Court should settle these questions once and for all.

2. The Court of Claims made no decision at all as to the validity or interpretation of War Production Board Order L-41, as pointed out in point 3, under "Questions Presented", nor on the questions of the government's estoppel, mentioned in point 5 of "Questions Presented."

3. The decision of the lower court denying petitioner relief, is contrary to the decisions of this Court as well as said lower court. It is too well established by now to require citation of authority that the government cannot withhold Notice to Proceed an unreasonable length of time and that the granting of an extension within which to do the work does not relieve the government of responsibility for damages.

4. There is no concurrence here of two lower courts in their findings of fact. The Court of Claims did not see or hear the witnesses. Its conclusion that petitioner knew that the CAA did not intend to issue Notice to Proceed until clearance was received from the War Production Board and that he proceeded at his own risk and was damaged by circumstances that were neither foreseeable nor attributable to the fault of either party, is contrary to the commissioner's finding on this vital point, and to the substantial evidence of the case. This court, therefore, should not hesitate to review the findings of the Court of Claims.

5. Despite the Revision and Codification of Title 28, United States Code, approved June 25, 1948, effective September 1, 1948, of the statutory provisions for Writs of Certiorari to the Court of Claims, this Court still may re-

view decisions of the Court of Claims where the following grounds exist:

(a) Lack of substantial evidence to sustain a finding of fact;

(b) Ultimate finding or findings not sustained by the findings of evidentiary or primary facts; and

(c) Failure to make any finding of fact on a material issue.

Petitioner contends all three of these grounds exist here. If the above rules are no longer applicable, then the "clearly erroneous" findings of the Court of Claims should be reviewed here.

It is respectfully submitted that your Honors should in this case issue a Writ of Certiorari to the United States Court of Claims.

Respectfully submitted:

GODFREY L. MUNTER,
CHARLES H. SACHS.
Counsel for Petitioner.

Washington, D. C., December 26, 1951.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 500

MICHAEL H. PARISH, DOING BUSINESS UNDER THE NAME AND STYLE OF ALLEGHENY ASPHALT & PAVING COMPANY,

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vs.

THE UNITED STATES, *Respondent*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. Opinion of the Court

The opinion of the United States Court of Claims in this case appears in the record in this Court on page 51, Court of Claims Case No. 47873.

II. Grounds of Jurisdiction

The Grounds of jurisdiction are set forth on page 1 of the Petition for the Writ of Certiorari.

III. Statement of the Case

A summary of the case appears on page 2 of the Petition. By way of amplification we add the following:

IV. Facts

In September 1943, the government, acting by and through its Civil Aeronautics Administration (hereinafter referred to as CAA), invited bids for grading, draining, and paving the Johnstown, Pennsylvania airport. Petitioner, a general contractor, located in Pittsburgh, Pennsylvania, put in a bid for $411,648.90. When the bids were opened on September 22, 1943, at LaGuardia Field, New York, he was found to be the low bidder for the project and Horace K. Glidden, The Chief of the CAA Engineering Branch, informed the petitioner that the contract would probably be awarded within a few days and that the project was to be finished before Christmas 1943. He also informed petitioner that the contract could not be awarded until a War Production Board (hereinafter referred to as WPB) rating had been received. Petitioner suggested that no priority rating was needed on this project, but Glidden then stated that it was a formality and necessity for the CAA to secure the rating, and that it was its responsibility to do so, but that it was just a matter of mechanics and petitioner should get ready because they wanted the job done that fall (F.F. 5, R. 43).

In November, petitioner received from CAA, first by telegram and then by letter, formal notice that the contract had been awarded to him. The letter dated November 15, 1943, reads as follows (F.F. 8, R. 45):

> "There will be forwarded you in the very near future Contract No. Clca-3391, Proposal No. 14-250 and the specifications and small drawings pertaining to this job. This letter constitutes a Notice of Award.
>
> This is not a Notice to Proceed. The Notice to Proceed is being issued as a separate letter, at which time the name and address of the inspector will be given to you.

> Since preference rating has not as yet been received in this office, *work not involving critical materials shall be commenced upon receipt of Notice to Proceed.*" (Italics supplied.)

Shortly thereafter CAA sent petitioner, for execution, copies of standard government contract, Form 23, with forms of Completion Bond, all of which he executed and returned promptly. On December 2, 1943, the government returned to petitioner an executed copy of the contract, signed on its behalf by A. J. Massari, Administrative Officer.

The contract provides that the work should be completed by the petitioner within sixty (60) calendar days (F.F. 10, R. 45), and subjects petitioner to a penalty in the sum of Four Hundred Dollars ($400.00) per day for delays (F.F. 11, R. 47). The contract further provides in Article 16 (c) "All Material and work covered by partial payments shall thereupon become the property of the Government."

The contract further provides that

> "M. Preference Rating: This project will be given a preference rating and controlled materials number by the War Production Board. Upon their issuance of Form CMTL-224 the successful bidder will be furnished with the approved rating and allotment number and complete instructions concerning their use."

The Johnstown Airport is located in a mountainous area of Pennsylvania and freezing weather generally occurs between November 15 and April 15 of the year following, and it is impossible to do satisfactory paving work in freezing weather. For these reasons, the parties to the contract mutually agreed that notice to proceed with the project should be withheld by the Government until the Spring of 1944, and the Court of Claims found that "The defendant should reasonably have issued notice to proceed effective

April 15, 1944" (F.F. 54, R. 65). In reliance upon his agreement with the Government that notice to proceed would be issued in the spring of 1944, petitioner, during the months of February and March 1944, assembled at the site of the Airport a very large paving plant, equipment and a large store of supplies. During said months of February and March 1944, Dan Parish, the petitioner's brother and general manager, met said Horace K. Glidden, on three different occasions at the Johnstown Airport. Glidden then saw the petitioner's plant, equipment and store of materials at the site of the Airport, and Glidden stated to Parish that he expected the notice to proceed to be issued between the 1st and 14th of April. Nothing was said about the necessity of any WPB rating (F.F. 23, R. 55). The petitioner at all times had the necessary equipment and materials to perform the work specified in the contract and could have done so within sixty (60) calendar days had he received notice to proceed. Little, if any, critical material was required for the construction and his machinery and equipment was adequate (F.F. 35, R. 59). None of the materials specified in the Contract required issuance of a priority rating for purchase of materials and supplies until certain equalization orders were issued in 1945 (Com. F.F. 18, R. 54).

No notice to proceed was received by petitioner in April 1944, or within a reasonable time thereafter, and he wrote to the CAA in New York; made several calls in person at its regional office in New York, and also went to Washington to talk to the Chief of the Airways and Engineering Division of the CAA, inquiring why he was not receiving notice to proceed. He informed the respondent, orally and in writing, that his expensive plant and equipment were tied up in idleness on the site of the project, and that he could not bid on other projects and that his hands were tied (F.F. 27, R. 57). Nobody could or would tell petitioner

anything and they could not tell him why the project was tied up. On May 3, 1944, the petitioner finally wired the CAA that unless he had some definite advice he would move his equipment off the project and, not receiving any answer to the telegram, he did so between May 6 and May 10, 1944, at substantial cost to himself (F.F. 29, R. 58), and he submitted to CAA an itemized bill of his damages and losses of approximately $170,000. In August 1944 the President of the United States (the late Honorable Franklin Delano Roosevelt) finally took a personal interest in the completion of the project and personally endorsed it "O.K. F.D.R." (F.F. 35, R. 59). As a direct consequence of which, the CAA on October 4, 1944, forwarded to petitioner telegraphic notice to proceed with the contract project effective October 16, 1944 (F.F. 40, R. 60). In the meantime the project was approved by the WPB "By Direction," meaning upon the recommendation of the President, and the CAA notified accordingly.

Immediately upon receiving notice to proceed, petitioner again notified the CAA that on account of freezing weather it would be impossible to complete the project within sixty (60) calendar days, but in order to escape the unconscionable penalty of the bond, he reassembled his plant and equipment at the site of the Johnstown Airport and started operations October 16, 1944 (F.F. 44, R. 61). This equipment was the same equipment which petitioner had moved off the project in May 1944, and the expense to him of moving the equipment back to the project was substantial (F.F. 44, R. 61). On October 20, 1944, the petitioner was stopped in his work by the government inspector on account of freezing weather and a short time thereafter, a permanent stop order was issued, effective until April 16, 1945, when operations were resumed and the work was completed and accepted by the government on August 11, 1945 (F.F. 46, R. 62).

Petitioner was also required to do extra work requiring forty-seven (47) additional days, but for which he was paid only $14,670.26 (F.F. 48, R. 63). As a result of being required to proceed with the work in October 1944, and the extra work, it took petitioner three hundred (300) days to perform the work specified instead of the sixty (60) days provided in the contract. On this point the Court of Claims made the following finding of fact (F.F. 47, R. 62).

> "Defendant made allowances to the contract time of 60 calendar days in the amounts of time and for the reasons assigned as follows:
>
> a. 47 days for extra work performed under equalization orders concerning changes in specifications for all ducts, manholes and catch basins and for planting of sod for bank protection.
>
> b. 18 days because approval of the project as to essentiality by the WPB was not received for approximately one year after awarding the contract.
>
> c. 20 days due to unusually severe weather encountered during period of performance.
>
> d. 155 days allowed because of stop orders mentioned above.
>
> "With the allowance of the aforementioned 240 days, the contract was completed without delay in the total elapsed time of 300 days, during all of which time the plaintiff's machinery, equipment, and organization were tied up on the contract project."

In connection with the extension in the contract time by the Government, its contracting officer, A. J. Massari, wrote petitioner under date of April 25, 1945, *inter alia*, as follows:

> "By reason of the fact that approval of this project as to essentiality by the War Production Board was not received until approximately 12 months after the opening of the bids on our proposal No. 14-250, it is believed that the difficulties encountered as a result

of this delay could not have been foreseen or anticipated by your company when submitting your bid for the above referred to job—" (F.F. 47, R. 62).

Petitioner was paid the contract price plus the above mentioned amount for extra work, but in the release petitioner specifically reserved his claim for his substantial damages (F.F. 52, R. 64).

V. Argument

A. THE WRIT SHOULD BE GRANTED BECAUSE OF THE GENERAL IMPORTANCE OF THE QUESTION PRESENTED AS TO THE APPLICABILITY TO GOVERNMENT CONTRACTS, ABSOLUTE AND UNCONDITIONAL, OF REGULATIONS OF THIRD PARTY AGENCIES SUCH AS WPB, NPA AND DPA.

If the decision of the lower court in the instant case is not reversed, or at least clarified, no contractor knows where he stands; no lawyer can advise his clients about their contractual rights, and no contract, such as is involved here, is worth the paper it is written on. Under the decision the Government can nullify, with immunity, any of its many construction contracts by *never* issuing a Notice to Proceed.

There is no particular sanctity attached to a Government contract, and a construction contract with the United States is construed as are contracts between private individuals, and performance is governed by the same rules. The Court of Claims itself said in *Steel Products Engineering Company* vs. *United States,* 71 C. Cls. 457,

> "The law is well settled by decisions in this and other courts that when the Government enters into a contract with one of its citizens it divests itself of the sovereign character and, so far as that particular transaction is concerned, takes on that of an ordinary citizen and has no immunity which permits it to recede from the fulfilment of its obligations."

As heretofore pointed out in the Statement of Facts, the contract in question here nowhere requires the prior approval of the project involved by the War Production Board, and in construing the obligations of the Government under the contract the language of this Court in the early case of *Ingle* vs. *Jones,* 2 Wall. 762, is particularly in point. The Court there said:

> "The principle, which controlled the decision of the cases referred to, rests upon a solid foundation of reason and justice. It regards the sanctity of contracts. It requires parties to do what they have agreed to do. If unexpected impediments lie in the way and a loss must ensue it leaves the loss where the contract places it. If the parties have made no provision for a dispensation of rule the law gives none. It does not allow a contract fairly made to be annulled and it does not permit to be interpolated what the parties themselves have not stipulated."

In the instant case, the lower Court has found (F.F. 54, R. 65):

> "The defendant (Government) should reasonably have issued Notice to Proceed effective April 15, 1944, except for its compliance with WPB Construction Conservation Order L-41, as amended."

Actually the Notice to Proceed was not issued until effective October 16, 1944, a delay of one hundred eighty-three (183) days. The contention interposed by the Government that Notice to Proceed could not be issued because the project was not approved as to essentiality by the WPB until October 1944 is no excuse. The complete answer to the contention of the Government is that:

> "(a) The contract is authorized by Act of Congress. (F.F. 9, R. 45).

"(b) The contract between the parties is totally silent as to the necessity for the approval of the project by WPB.

"(c) The project was expressly exempted by the terms of WPB Conservation Order L-41."

Neither the contract nor the invitation for the bids, nor the specifications, contained one word about the necessity of the approval of the project as to essentiality by the WPB. The specifications do, however, contain references to "priority ratings" but, as hereafter pointed out, there is a vast difference between priority ratings on the one hand and approval as to essentiality of the project on the other hand. The evidence in this case shows that (F.F. 35, R. 59):

> "Little, if any, critical material is required for the construction, and machinery and equipment is adequate."

The evidence also shows (Com. F. F. 18, R. 54) that:

> "The parties throughout treated it as the function of the CAA to obtain priority ratings. The plaintiff at all times had the necessary equipment and material to perform. None of the material specified in the contract required the issuance of a priority rating for the purchase of materials and supplies until certain equalization orders were issued in the year 1945."

If the Government intended that the project should be contingent upon its prior approval as to essentiality by the War Production Board, as contradistinguished from preference ratings for critical materials, if any were required, the Government should never have entered into the contract. Actually it told petitioner that the contract would not be awarded until the preference ratings of the WPB were obtained and, in fact, Mr. Glidden wrote to Washington to the same effect. Not only was it the duty

of the Government not to execute the contract until such ratings were obtained, if necessary, but in fairness and morality the Government should not have concealed this information from petitioner when the contract was delivered, so that he would not have incurred the very heavy and useless expense of moving his equipment to the site and off again and back again and then eventually have it tied up for three hundred (300) days instead of sixty (60) days.

This is not a case of delay caused by proper operation of the priority system but is a case of wilful misconduct on the part of the Government in executing a contract and in causing careless delays. Aside from the failure of the Government to disclose to petitioner its belated contention that WPB approval of the project as to essentiality was necessary before Notice to Proceed could be issued, as above pointed out, the Government's representative, Glidden, actually was on the site of the Airport on three different occasions in February and March 1944 and saw the elaborate preparations being made to proceed with the work as of April 15. It was then the duty of the Government representative to speak and not to stand there with his mouth closed. The case of *Ross Electric Construction Company, Inc. vs. United States*, 711 C. Cls. 644, is directly in point. There the court said:

> "Also, if there had been evidence that defendant knew there would be delays growing out of the operation of the system and plaintiff did not know, and the defendant nevertheless gave plaintiff notice to proceed without disclosing such information and did thus put plaintiff to needless expense, a basis for a claim might be found."

B. PETITIONER IS ENTITLED TO RECOVER HIS LOSSES, CAUSED BY THE FAILURE OF THE GOVERNMENT TO ISSUE NOTICE TO PROCEED WHEN AGREED UPON OR AT A REASONABLE TIME AND THE COURT OF CLAIMS ERRED IN NOT ALLOWING DAMAGES TO THE PETITIONER.

As elsewhere pointed out in this brief, the Court of Claims found that the Government should have issued Notice to Proceed effective April 15, 1944 (F. F. 54, R. 65). The record also shows that no Notice to Proceed was issued until effective October 16, 1944. The Court of Claims also found that as a result of delay in issuing Notice to Proceed, and the eventual issuance of the Notice in the wintertime, the petitioner was substantially damaged. By a long series of unbroken decisions, both this Court and the Court of Claims have held the Government to accountability for such losses where the delay was caused by the fault of the Government, as here. The leading cases on the subject are: *United States* v. *Behan*, 110 U. S. 338; *United States* v. *Smith*, 94 U. S. 214; *United States* v. *Speed*, 8 Wall. 77, 84. The Court of Claims has consistently held the Government responsible for such losses and Judge Whitaker, of said Court, in *Fuller* v. *United States*, 108 C. Cls. 70, in a learned and elaborate opinion, reviewed the many authorities giving redress to contractors smilarly circumstanced as petitioner here. Exactly in point is *Ross Engineering Company* v. *United States*, 92 C. Cls. 261, where the court said:

> "Upon the facts set forth in the findings, we are of opinion that the defendant unreasonably delayed giving plaintiff notice to proceed after the contract had been executed and performance bond furnished, and that plaintiff is entitled to recover its reasonable and necessary expenses incurred."

The fact that the Government later granted extensions to petitioner is immaterial and does not bar petitioner's re-

covery. The lower court found that instead of being able to accomplish the project in sixty (60) days, it took him three hundred (300) days. Furthermore, petitioner was required to do a disproportionate amount of extra work. We say it is unreasonable to require a contractor who must perform within sixty (60) calendar days certain work for about $411,000.00 and then require that same contractor, by virtue of the terms of the contract, to do extra work requiring forty-seven (47) days for about $14,000. The court itself found that on account of being shut down for the winter and being required to do the extra work, *all* of petitioner's plant and equipment was tied up for three hundred (300) days. The petitioner is entitled to recover damages for these delays. The court below made no finding or distinction as to losses suffered by petitioner on account of failure to issue Notice to Proceed in the Spring of 1943 and losses sustained *after* Notice to Proceed was issued. The defense injected by the Government as to the applicability of WPB Conservation Order has nothing to do with the damages which petitioner suffered as a result of being ordered to proceed with the project in the wintertime, nor on account of being required to do all this extra work. The following cases support petitioner's claim for damages for these extra losses: *Karno-Smith Company* v. *United States,* 84 C. Cls. 110, 121; *United States* v. *Smith,* 94 U. S. 214; *Edge Moor Iron Company* v. *United States,* 61 C. Cls. 392, and *Goldstone et al.* v. *United States,* 61 C. Cls. 401; *Plato* v. *United States,* 86 C. Cls. 665.

C. THE COURT OF CLAIMS ERRED IN RECEIVING IN EVIDENCE AND CONSIDERING THE SO-CALLED CITY OF JOHNSTOWN CONTRACT AND INTERDEPARTMENTAL CORRESPONDENCE, TO WHICH PETITIONER WAS NOT A PARTY AND OF WHICH HE HAD NO KNOWLEDGE.

During the trial of the case the Government offered in evidence a resolution adopted by the City Council of the

City of Johnstown and acceptance thereof by the CAA. The petitioner was not a party to the resolution, knew nothing about it until it was offered in evidence and objected to it. The Commissioner admitted the evidence subject to the future ruling by the Court of Claims as to materiality and relevancy (R. 81-85). The Court of Claims, without passing upon the materiality or relevancy of this most damaging evidence and without deciding the legal point raised by petitioner, simply treated the resolution and acceptance thereof as being part of the evidence. The same situation developed about very voluminous interdepartmental correspondence between various governmental agencies. The petitioner objected to this correspondence on the ground of its immateriality and irrelevancy (R. 81-85), and the Commissioner admitted it subject to the same eventual ruling by the Court of Claims. The court apparently treated the correspondence as part of the evidence, without passing upon or deciding the objection raised by petitioner.

Without this contract in evidence, the question of the applicability of WPB Conservation Order L-41 would not arise because this order specifically exempts from its operation, Civil Aeronautics Authority construction, and it would not be necessary, under any circumstances, to obtain the approval of the WPB of a CAA project. However, the City of Johnstown resolution provides that the project should belong to the City and not to the Government. The petitioner's contract provides just the opposite, namely that "all material and work—shall become the property of the Government." The Court of Claims chose to follow the improperly admitted City of Johnstown resolution as far as ownership of the project was concerned rather than the contract between petitioner and the Government.

The City of Johnstown contract (resolution and acceptance) was entered into between the Government and the City of Johnstown before the Government entered into the

contract with the petitioner, yet, strangely enough, no mention is made thereof in the latter contract, either directly or indirectly. As far as petitioner was concerned he was dealing solely and exclusively with the Government and not with the City of Johnstown. He had nothing to do with the City of Johnstown. His contract was with the Government and no one else. The Government told him what to do, when to do it, how to do it, and paid him whatever money he got. To hold the petitioner chargeable with knowledge of the City of Johnstown contract under these circumstances is preposterous. It is Hornbook law that contracts are not binding upon persons if they are not parties thereto and know nothing about it.

What has been said in the preceding paragraph about the City of Johnstown contract is equally applicable to the interdepartmental correspondence. It is preposterous that a litigant should be charged with knowledge of correspondence between various department heads about a project when the correspondence is not brought to the attention of the litigant until the trial of the case, and then only to his prejudice. Not only was this evidence inadmissible in the case but at least the Court of Claims should have made some ruling on the subject and should not have treated the objectionable documents as though they were a part of the evidence in the case.

The following cases are exactly in point: *Joseph Moore* v. *United States*, 91 U. S. 270, 23 L. Ed. 346, where the Court said:

> "The great majority of contracts and transactions which come before the Court of Claims for adjudication are permeated and are to be adjudged by the principles of the common law.—we think that where Congress has not provided and no special reason demands a different rule, the rules of evidence as found in the common law ought to govern the action of the

Court of Claims. If a more liberal rule is desirable, it is for Congress to declare it by proper enactment."

Of like tenor is: *United States* v. *Corwin*, 129 U. S. 381, 39 L. Ed. 710, where the Court said:

> "Incompetent and irrelevant evidence cannot be converted into competent and relevant evidence simply because it is contained in an offical communication."

To the same effect is: *Fain Grain Company* v. *United States*, 68 C. Cls. 44, where the Court said:

> "The government is not exempt from the rules of evidence applicable to other litigants."

D. THE COURT OF CLAIMS ERRED IN NOT CONSTRUING OR INTERPRETING WAR PRODUCTION BOARD ORDER L-41

The only reference in the contract to the War Production Board ratings appears in the bid attached to the contract, and is quoted on page 3 of this brief.

The pertinent parts of Conservation Order L-41, as amended, are set forth on pages 33 and 34 of the record. We quote the relevant part from page 34:

> "1075.1 *Conservation Order L-41-(a) What this order does.* This order limits construction. It is necessary in order to conserve materials, construction equipment, labor and transportation. In most cases, except where the construction is of a special kind, you must get permission from the War Production Board for construction. This permission (sometimes called "authorization to begin construction") must not be confused with preference ratings or priorities. If a construction job is allowed, either because it is not of the kind restricted by this order or because permission has been obtained, it may still be necessary to get preference ratings for the materials and fixtures which are needed. On the other hand, you may still

have to get permission to use them for a particular construction job.

"(d) *Special kinds of construction which do not require permission.* It is not necessary to get War Production Board permission under this order for the following kinds of construction:

"(6) Construction owned by the United States Army, Navy, Maritime Commission, War Shipping Administration, Coast Guard, Marine Corps, *Civil Aeronautics Authority,* Coast and Geodetic Survey, or Panama Canal."

This order, constituting the only defense interposed by the Government to petitioner's claims, very plainly points out the distinction between a preference rating and approval as to the essentiality of the project itself. The provision about preference rating deals exclusively with the *procurement* of materials and supplies to be used in constructing the project where such rating was necessary. This provision has nothing to do with the *approval as to essentiality of the project itself by WPB.* As hereinabove pointed out, the petitioner at all times had the necessary equipment and materials to perform and none of the materials specified in the contract required the issuanc of priority ratings. The principal material used in paving the Airport consisted of slag, of which there was an over abundance due to the great activity of the steel mills in the Pittsburgh area.

The references to preference ratings have only to do with what might be critically short materials. If the Government ever considered or contended, prior to going into court, that the reference to preference ratings was synonymous with non-approval as to essentiality of the project by WPB, it is only reasonable to assume that at least one of the Government's representatives, or at least a contracting officer, would have at some time or other

so stated and would have informed the petitioner. Instead of that, the facts are that (F.F. 5, R. 43):

> "Mr. Glidden told the plaintiff that the project was urgent, that the contract would probably be awarded within a few days and that the project was to be finished before Christmas. He also informed the plaintiff that the contract could not be awarded until the WPB rating had been received. Plaintiff suggested that no priority rating was needed on this project, but Mr. Glidden stated that it was a formality and necessity for the CAA to procure the rating and that it was its responsibility to do so, but it was just a matter of mechanics and plaintiff should get ready because they wanted the job done that fall."

These statements made by Mr. Glidden to Mr. Parish are consistent with the statement made in the letter dated November 8, 1943, signed by A. J. Massari, Administrative Officer, Region I, CAA, confirming telegraphic notice of award of contract (F.F. 8, R. 45) that:

> "Since preference rating has not as yet been received in this office, *work not involving critical materials* shall proceed upon receipt of Notice to Proceed."

This again can only mean that petitioner is required to proceed with the work upon receipt of Notice to Proceed, but that if any critical materials are to be required they would have to await the preference rating. In other words, petitioner could go ahead with the project as soon as Notice to Proceed was received since "little, if any, critical material" was required for the construction and there was an ample supply of slag on hand. It also means that CAA could give Notice to Proceed, in its own interpretations of WPB Order L-41, at any time, without the prior approval of the project or issuance of preference ratings by WPB. Any other interpretation makes the above quoted sentence meaningless.

We contend that in this particular case it was the duty of the lower court to interpret and construe this WPB Order L-41; instead of passing thereon the court apparently assumed that *preference rating* is the same thing as approval as to essentiality of the project. The two are entirely different and have nothing to do with each other.

Irrespective of the foregoing, it is also crystal clear that WPB Conservation Order L-41 specifically exempted the project involved here from its operation. As appears from the quoted order, it specifically says so in so many words (Page 15 of this brief).

The construction of the Johnstown Airport was "construction owned by the Civil Aeronautics Authority" within the meaning of the Conservation Order. The theory in back of the Conservaton Order is plain enough. There was a scarcity of materials in the country as well as a labor shortage in some localities. The WPB was made the overall authority for the distribution of scarce materials. It was also the intention to limit construction. The order provided:

> "In most cases, *except where the construction is of a special kind,* you must get permission from the War Production Board for construction.

Then it described in subsection (d) *"special kinds of construction which do not require permission."* Among them subparagraph (6), is "construction owned by the United States Army, Navy, Maritime Commission, War Shipping Administration, Coast Guard, Marine Corps, *Civil Aeronautics Authority,"* etc. It was never the intention to give the WPB a veto on the United States Army or Navy or Maritime Commission or Civil Aeronautics Authority. It is unreasonable to assume that WPB could tell the Army, for example, that a new gun plant, or shell factory, or battleship, could or could not be constructed,

As far as petitioner is concerned he only dealt with the CAA. He got his invitation for bid, contract, orders, specifications and eventually a part of his money from the CAA. The City of Johnstown never had anything to do with the project and, as hereinbefore pointed out, as far as the petitioner was concerned the City of Johnstown did not enter this case until during the taking of the testimony. As far as petitioner was concerned, *this construction* was being done for the Government and the Government owned it. On top of that we have the specific provision in the contract, Article 16 (c) providing that:

> "All material and work covered by partial payments shall thereupon become the property of the Government" (F. F. 10, R. 45).

The conclusion is inescapable that this is construction owned by the Government for the purposes of Conservation Order L-41, and the project is specifically excepted from the operation of the order and consequently no prior approval of the project as to essentiality was necessary from WPB, nor any preference rating.

E. THE DECISION OF THE CONTRACTING OFFICER AS TO CAUSES OF DELAYS IS FINAL, CONCLUSIVE AND BINDING ON BOTH PARTIES AND THE GOVERNMENT IS ESTOPPED TO DENY LIABILITY AND THE COURT OF CLAIMS SHOULD HAVE MADE A FINDING AND DECISION ON THE QUESTION OF ESTOPPAL.

Articles 9 and 15 of the contract (R. 12 and 14) between the parties contain the standard provisions for the amicable settlement of disputes between the parties concerning questions of fact and provide that the decision of a contracting officer as to delays, etc. shall be "final and conclusive upon the parties thereto." In the instant case, Mr. Massari, the contracting officer, investigated, found, decided and wrote to

the petitioner under date of April 25, 1945, *inter alia*, as follows:

> "By reason of the fact that approval of this project as to essentiality by the War Production Board was not received until approximately 12 months after the opening of the bids on our proposal No. 14-250, it is believed that the difficulties encountered as a result of this delay could not have been foreseen or anticipated by your company when submitting your bid for the above referred to job—" (F. F. 47, R. 62).

In other words, the contracting officer found that the petitioner could not have foreseen or anticipated the delay of obtaining the approval of the project by the War Production Board. The Court of Claims rejects and disregards the decision of the contracting officer and holds that petitioner "proceeded at his own risk" (R. 68). We say that the decision of the contract officer was final and conclusive and since it is binding upon the parties the lower court has no authority to substitute its views of the facts for those of the contracting officer. The Court of Claims has itself recognized this principle in *Albina Marine Iron Works* v. *United States*, 79 C. Cls. 714, and in *Fuller Company* v. *United States*, 108 C. Cls. 70. Your Honors were again called upon to determine the meaning of the finality clause of the standard Government form contract, such as is involved here, as recently as November 26, 1951, in the case of *United States* v. *Wunderlich*, #11, October Term of Court. Your Honors reviewed the many decisions on the subject and reaffirmed the validity of the finality clause and the finality of the decision of contracting officers.

F. THIS COURT SHOULD UNHESITATINGLY REVIEW THE RECORD, INCLUDING THE REPORT OF THE COMMISSIONER, AND DETERMINE FOR ITSELF WHETHER THE DECISION OF THE LOWER COURT IS BASED UPON SUBSTANTIAL EVIDENCE.

The recent tendency of appellate tribunals is to give more weight and dignity to reports of examiners and commissioners and their findings than previously. This is particularly so since the enactment of the Administrative Procedure Act, although this particular act does not apply to the Commissioners of the Court of Claims. Appellate courts now deem it their duty, unhesitatingly, to examine the record to see for themselves whether the evidence supporting the lower court's findings is substantial. Your Honors had occasion, as recently as July 5, 1951, to reconsider the rule about the review of facts and evidence of lower courts and findings of commissioners in the case of *Minneapolis-Honeywell Regulator Company* v. *Federal Trade Commission*, 191 F. (2d) 786, cited with approval in *Consolidated Royal Chemical Company* v. *Federal Trade Commission*, October 22, 1951, 191 F. (2d) 896, and Your Honors said:

> "Under the rule of *Universal Camera Corporation* v. *National Labor Relations Board*, 340 U. S. 474, 496, 71 S. Ct. 456, it is the duty of this court to examine the record as a whole, including the report of the examiner to determine whether the evidence supporting the commissioner's order is substantial."

And the Court there observed:

> "—evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn a conclusion different from the board's than when he has reached the same conclusion. The findings of the examiner are to be considered along with the consistency and inherent probability of testimony."

Further on your Honors said:

> "And while the findings of an examiner are not as 'unassailable as a master's' where it appears from the record that they are supported by a preponderance of the evidence, the action of the commissioner in rejecting them is arbitrary."

Particularly should the above rule be applied where, as here, the lower court rejected a pivotal finding of its commissioner and made a finding just opposite from his. The cogency of the rule is not diminished by the fact that in the instant case the Commissioner who heard the witnesses died before making his report because a new Commissioner was appointed in his place who studied the record, the testimony and before whom counsel argued the case and reviewed the evidence. We ask Your Honors to take this case, examine the record, and determine for yourselves, for example, whether Glidden advised by telephone petitioner in December, 1943 (or at any time prior to his moving his plant and equipment to Johnstown), that WPB had to approve the project before Notice to Proceed could be issued by CAA (See findings on Page 2 of Petition).

In view of the fact that the lower court's decision, relieving the Government of liability, is to a large degree based upon this erroneous finding that the petitioner was told by Glidden by telephone in December 1943 that WPB had disallowed the project, this telephone call can be regarded as the most important communication between the parties in the whole case. It is therefore reasonable to assume that this alleged call should be confirmed in writing, or at least be referred to, directly or indirectly, in subsequent correspondence, telegrams, documents, or even conversations. Yet there is not the slightest mention or reference to it anywhere. The very voluminous documentary record in this case, and the many additional documents referred to in the

oral testimony, established, beyond peradventure, that with the exception of this alleged telephone conversation, some form of *writing* passed in every other instance between the parties, about the minutest details of the entire transaction, commencing with the time the bids were advertised and ending with the payment of the final voucher. It is most singular that when Glidden comes to the most important communication in this case he should make it by telephone; that the conversation should not be thereafter confirmed by telegram, letter or some other document, and that nowhere should the alleged telephone conversation be subsequently referred to in any of the correspondence between the parties. Glidden himself testified it was the practice of his office to put *all* phases of the matter in writing. The truth is that he simply never made the call and there is no substantial evidence in the record to justify the finding by the Court of Claims that he did make such a call. The fact also is that the Government never claimed that any such telephone call was made until the witness Glidden took the witness stand, and no records from the telephone company were produced to indicate that any such call was ever made. Glidden was in New York and petitioner's offices in Pittsburgh, and the long distance records of the telephone company were available to the Government.

Nor does it stand to reason that if any such telephone call were ever made or brought to the attention of petitioner or his agents, he would thereafter have moved from Pittsburgh to Johnstown an $800,000 paving plant in preparation for his starting the project on April 15, 1944.

We ask this Court to seize the opportunity here presented to clarify, under the new Title 28, Section 1255, of the United States Code, the scope of review by this Court of the findings of the Court of Claims. In view of the repeal by the new Title of the old statutes this Court should now hold applicable the old equity scope of review, as provided in the

Act of May 22, 1939, quoted on page 2 of the Petition, under "Relevant Parts of Statutes Involved." It is not now clear whether this Court will review with the full scope of the old equity review, apply the "clearly erroneous" rule to the findings of the Court of Claims or the "substantial evidence" rule appearing in the amendment of May 22, 1939, above referred to.

In this connection the following citation from Stern and Gressman's Supreme Court Practice, Page 43, (Bureau of National Affairs, Inc., 1950) is persuasive, although of course not controlling. The rule is there stated as follows:

> "But since that rule was enacted as an embodiment of the best trial practice in reviewing findings of trial judges, the Supreme Court may apply it to Court of Claims cases despite the absence of any controlling statute or rule of court. Although such a result would be reasonable, there can be no certainty as to the scope of review of Court of Claims findings under the new statute until the Supreme Court has spoken."

Apposite also are the reviser's notes covering Section 1255 of the new Title 28 of the United States Code following the quoted section of Title 28 in the United States Code Annotated. They are as follows:

> "Based on title 28, U.S.C., 1940 ed. S 288 (Feb. 13, 1925, ch. 229, 3, 43 Stat. 939; May 22, 1939, ch. 140, 53 Stat. 752).
>
> "Words 'including those begun under section 287 of this title' appearing in subsections (a) and (b) of section 288 of title 28, U.S.C., 1940 ed., were omitted as surplusage.
>
> "The provision of subsection (a) of section 288 of title 28, U.S.C., 1940 ed., for review and determination of all errors assigned, 'with the same power and authority and with like effect, as if the cause had been brought thereby appeal,' was omitted as unnecessary. Review under this section is unrestricted.

"Provisions for authority to review, in addition to other questions of law, 'errors assigned to lack of evidence to sustain a finding of facts; that an ultimate finding or findings are not sustained by findings of evidentiary or primary facts; or that there is a failure to make a finding of fact on a material issue, 'were omitted as unnecessary.'

"Subsection (c) of section 288 of title 28, U.S.C., 1940 ed., was omitted as covered by the language at the beginning of the revised section.

"Changes were made in phraseology and arrangement."

We repeat that since the Court of Claims does not see and hear the witnesses and there is no intermediate appellate court, Your Honors should afford the same scope of review to a Court of Claims case as the old equity review. It is important that the legal profession should have an indication from your Honors as to the scope of future reviews of cases from the Court of Claims.

VI. Conclusion

To sum up, the factual situation presented here clearly entitles petitioner to relief and the Court of Claims erred in denying it. Good faith demands that the government be required to pay the petitioner's losses sustained by him because the government did not do what it agreed to do.

Bona Fides Exigit ut Quod Convenit Fiat.

Petitioner therefore prays that this Court issue its writ of certiorari to the United States Court of Claims and that the judgment of said Court of Claims be reviewed fully by this Court and reversed and remanded.

Respectfully submitted:

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Washington, D. C.,
December 26, 1951.

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 500

MICHAEL H. PARISH, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 65-69) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on July 9, 1951, and petitioner's motion for a new trial, filed on August 6, 1951, was denied on October 2, 1951 (R. 69). The petition for a writ of certiorari was filed on December 28, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether, under a standard form Government construction contract, the contractor may recover damages for the delay in issuing notice to proceed where such delay resulted from the contracting agency's inability to obtain War Production Board approval of the project.

REGULATION INVOLVED

The pertinent portions of War Production Board Conservation Order No. L-41, of April 9, 1942, 7 Fed. Reg. 2730, and of its amendment of November 1, 1943, 8 Fed. Reg. 14795, are set forth in the Appendix, *infra,* pp. 11-15.

STATEMENT[1]

In December, 1943, petitioner entered a standard form Government construction contract (R. 7-15) with the Civil Aeronautics Administration for the construction of runways and taxiways for an airport at Johnstown, Pennsylvania. Before permitting petitioner to proceed with the work C.A.A. set about obtaining approval of the project by the War Production Board, whose Conservation Order L-41, promulgated in April, 1942, Appendix, *infra,* pp. 11-15, forbade construction work without its approval. C.A.A. was unable to obtain the required approval until September, 1944, a year after it had first invited bids, and it withheld its

[1] The facts are stated as found in the Court of Claims' special findings. The designation "F" refers to special findings; the designation "R" refers to the record page numbers.

notice to proceed until then. It had been expected that the notice to proceed would be issued in April, 1944. Because of the delay in giving notice to proceed and because the notice, when finally issued, forced petitioner to work during the winter months in unsuitable weather, with consequent delays in the work, petitioner suffered expenses in keeping his equipment ready and in moving it back and forth from other jobs. He seeks to recover these expenses.

The airport was owned by the City of Johnstown. C.A.A. undertook the project pursuant to an agreement, embodied in a resolution of the City, under which C.A.A. was to build the facilities in consideration of the right to use the airport under certain conditions. Title to the land and to all improvements remained in the city. (F. 3, R. 43.)

The invitations to bid for the contract were issued by C.A.A. on September 7, 1943 (F. 4, R. 43). It was originally contemplated by both parties that the work could be finished by Christmas, 1943. However, the remaining steps in the award and execution of the contract were not completed until December 2, 1943 (F. 9, R. 45). The work was to be completed within sixty days (F. 7, R. 44). The notice of award having been delayed until November (F. 6, 8, R. 44, 45), petitioner requested C.A.A. to withhold its notice to proceed until April 15, 1944, so that it would not be compelled to work under winter conditions, and C.A.A. granted its re-

quest (F. 17, 18, R. 53, 54). The contract, however, provided that notice to proceed was to be issued at the Government's convenience (F. 12, R. 48).

Meanwhile, C.A.A. sought to obtain W.P.B. approval and priority ratings for the project, under Conservation Order L-41. Article 10 of the contract obligated the contractor to obtain all required licenses and permits, but from the beginning the parties apparently understood that C.A.A. was to obtain the necessary approval from W.P.B. (F. 19, 5, 16, R. 54, 44, 52.) C.A.A. first applied for approval on October 8, 1943, shortly after the bids were opened (F. 15, R. 51). At the end of December W.P.B. refused approval (F. 16, R. 52). Thereafter C.A.A. pursued its application by means of various letters, to the Army requesting it to recommend the project to W.P.B., and to W.P.B. itself (F. 20, 22, 24, 36, R. 54, 55, 59). The court below found as a fact that the Administration had used due diligence in its attempts to obtain approval of the project (F. 54, R. 65), and this is not disputed. There is no contention that W.P.B. was acting arbitrarily or otherwise wrongfully in withholding approval (F. 54, R. 65).

Approval was finally obtained in September, 1944, about a year after the opening of bids (F. 37, 38, R. 60). It was forwarded to petitioner, and the notice to proceed was issued on October 4, 1944 (F. 39, 40, R. 60). While C.A.A. and other interested agencies had been negotiating for W.P.B. approval of the project, petitioner had been active in at-

tempting to secure a notice to proceed (F. 23, 25, 27, R. 55, 56, 57), and in the early spring, relying on the assurances of C.A.A.'s regional representative that the notice would be forthcoming shortly, had begun to assemble materials and equipment at the site (F. 19, 23, R. 54, 55). After this equipment had remained idle at the site for some time, it became necessary for petitioner to remove it to other jobs and to return it to Johnstown when the notice to proceed issued (F. 28, 29, 44, R. 58, 61).

After the work began it was delayed by stop orders, so that it took 300 days, instead of the contemplated sixty, before the project was finally completed in August, 1945 (F. 47, R. 62). Forty-seven days of the delay were attributable to a change in the specifications, for which petitioner was compensated (F. 48, R. 63); the balance was due to stoppages on account of winter weather (F. 45, 46, R. 62). Petitioner was given allowances for all of these delays, so that no liquidated damages for delay, as provided in the contract, were assessed (*ibid.*).

Petitioner had made and preserved a claim with C.A.A. for damages resulting from the delays (F. 25, 50, R. 56, 64), and after it was rejected he brought this action, claiming $188,551.53 for breach of contract (R. 1-6). The damages itemized included $163,826.65 for loss of use of his equipment, and the balance for various costs of transporting it (R. 18).

ARGUMENT

The judgment below, based upon elementary principles of contract law, is clearly correct and does not warrant review by this Court. The narrow issue before the Court of Claims was whether, in the circumstances of this case, C.A.A. had an obligation to issue its notice to proceed sooner than it did. The court correctly found that C.A.A. acted reasonably in withholding the notice pending W.P.B. authorization of the project and that there was, therefore, no breach of contract.

1. Petitioner contends (Pet. 4, 19-22) that C.A.A.'s efforts to meet the requirements of W.P.B. Construction Conservation Order L-41 (Appendix, *infra,* pp. 11-15) do not excuse its delay in issuing the notice to proceed because there was no reference in the contract to the necessity for W.P.B. approval. But it is settled that a contracting agency's action in compliance with generally applicable government regulations, though such regulations may have been promulgated by another agency, does not constitute a breach of contract. *Horowitz* v. *United States,* 267 U.S. 458. As the *Horowitz* case shows, this rule applies even where the regulations are issued after the contract has been made, so that the absence from the contract in this case of any reference to Order L-41 is plainly immaterial. It may be noted, however, that Order L-41 had been in effect for a year and a half when bids were invited on the

present contract, and petitioner is presumed to know the law.

2. Petitioner was to be given notice to proceed under the contract "at the convenience of the Government" (R. 48). There was no warranty that such notice would be issued at any particular time; at most, the Government undertook to exercise reasonable diligence in making the work available. *United States* v. *Foley Co.*, 329 U.S. 64; cf. *United States* v. *Rice*, 317 U.S. 61; *Crook Co.* v. *United States*, 270 U.S. 4. The undisputed facts of this case demonstrate that even this implied obligation was fully met.

The record shows that C.A.A. was unable to obtain W.P.B. authorization for the contract work until September, 1944, and that the notice to proceed was issued promptly thereafter (R. 60). Petitioner raises no question as to the propriety of the finding below (R. 65) that C.A.A. used due diligence in requesting W.P.B. approval, and there is no suggestion that W.P.B. acted wrongfully in its initial refusal to grant the request (R. 65). Indeed, as petitioner points out (Pet. 17), an order of the President was ultimately required to resolve the difficulties attending the question whether to authorize wartime construction of the Johnstown Airport facilities. Appraising these facts, the court below concluded (R. 68): "we cannot say, in this instance, that the delay in giving notice to proceed was so unreasonable as to amount to a

breach of contract." This factual conclusion—resolving an issue of a kind which could rarely, if ever, warrant review by this Court—was clearly justified and is dispositive of petitioner's claim.

3. Petitioner argues finally (Pet. 26, 30) that he did not know the airport involved in the contract belonged to the City of Johnstown, that it should be regarded as having belonged to C.A.A., and that it was, therefore, exempt from the requirements of W.P.B. Order L-41. But the inescapable facts in the record are that the airport and the improvements thereon to be made by petitioner belonged to the City, not to C.A.A. (R. 43), so that the exception in the Order (§ 1075.1 (b) (1), *infra*, pp. 11-12) for "property of * * * the Civil Aeronautics Authority" was in plain terms inapplicable. That petitioner may not have known who owned the airport is, of course, immaterial to the question whether the order applied and in no way detracts from the reasonableness of the efforts of C.A.A., knowing the order to be applicable, to obtain the required W.P.B. authorization.[2] His prior knowledge, or lack of it, might conceivably have been material in an attempt by the Government

[2] Petitioner not only errs in attaching significance to his lack of advance knowledge of the Order's applicability, but erroneously charges the court below with making an incorrect finding on this essentially immaterial issue. Thus, petitioner points out (Pet. 31-32) that "the contracting officer found that the petitioner could not have foreseen or anticipated the delay of obtaining the approval of the project by the War Production Board", and argues that this finding was improperly ignored by the court. Cf. *United States* v. *Wunder-*

to penalize him for delay, but not in this action by him for damages. Cf. *Smoot's Case,* 15 Wall. 36.

Even if C.A.A.'s belief that Order L-41 applied could be viewed as having been erroneous, there would have been no breach of the contract. As the court below held (R. 68, n. 1), it matters only that this belief was reasonable. For C.A.A., like other government agencies and contracting parties generally, had a duty to proceed lawfully. Its withholding of the notice to proceed pending W.P.B. approval, based upon a reasonable interpretation of the W.P.B. order (an interpretation concurred in by all of the officials concerned), cannot be deemed a failure to exercise due diligence, which is the most petitioner had a right to expect.

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lich, 342 U.S. 98. But far from finding that petitioner could have foreseen the delay, the Court of Claims, fully agreeing with the contracting officer, concluded that petitioner "proceeded at his own risk" in planning his operations on the assumption that notice to proceed would be issued earlier than it was, "and having been damaged by circumstances that were neither *foreseeable nor attributable to the fault of either party,* he must bear that loss himself." (R. 68; emphasis added.)

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY, 1952.

APPENDIX

The pertinent provisions of War Production Board Construction Conservation Order L-41, 7 Fed. Reg. 2730, read as fololws:

War requirements of the United States have created a shortage of all materials required for war production and construction necessary thereto, for private account and for export; the War Production Board accordingly has stated as its policy that it is in the national interest that all construction which is not essential, directly or indirectly, to the successful prosecution of the war, and which involves the utilization of labor, material or construction plant urgently needed in the war effort, be deferred for the duration of the emergency; the following order is, therefore, necessary and appropriate in the public interest to conserve scarce materials by allocating them to essential uses and restricting their use in nonessential construction.

§ *1075.1* Conservation Order *L-41*

* * * * *

(b) *Prohibited construction.* No Person shall, after the date of issuance of this Order, Begin Construction, or order, purchase, accept delivery of, withdraw from inventory or in any other manner secure or use material or construction plant in order to Begin Construction, unless the Construction is within one of the following classes:

(1) The Construction is to be the property of the Army or Navy of the United States, the

United States Maritime Commission, the Panama Canal, the Coast and Geodetic Survey, the Coast Guard, the Civil Aeronautics Authority, or the Office of Scientific Research and Development.

* * * * *

(7) The Construction has been or is hereafter authorized by the Director of Priorities of the Office of Production Management or by the Director of Industry Operations by the issuance of

(i) one of the Preference Rating Orders or Certificates listed on Schedule A attached hereto, as that Schedule may be amended from time to time, according priorities assistance to the Construction; or

(ii) An order specifically authorizing the Construction.

* * * * *

Schedule A—Conservation Order L-41

The following Preference Rating Orders and Certificates are listed pursuant to paragraph (b) (7) (i) of the above Order. A general description of the type of construction covered by each, the appropriate application form and where such form should be filed, are given solely for purposes of identification.

* * * * *

P–19–h, P–19–i	Building, structures and projects important to the war effort and essential civilian needs other than housing.	Forms PD–200 and PD–200A	With the field office of FHA having jurisdiction over location of the site.
P–41.....	Construction of air transport facilities.	See Order	

* * * * *

The pertinent provisions of the November 1, 1943, amendment of Order L-41, 8 Fed. Reg. 14795, read as follows:

§ 1075.1 *Conservation Order L-41* — (a) *What this order does.* This order limits construction. It is necessary in order to conserve materials, construction equipment, labor and transportation. In most cases, except where the construction is of a special kind, you must get permission from the War Production Board for construction. This permission (sometimes called "authorization to begin construction") must not be confused with preference ratings or priorities. If a construction job is allowed, either because it is not of the kind restricted by this order or because permission has been obtained, it may still be necessary to get preference ratings for the materials and fixtures which are needed. On the other hand, if you have ratings for materials, or materials on hand, you may still have to get permission to use them for a particular construction job.

* * * * *

(d) *Special kinds of construction which do not require permission.* It is not necessary to get War Production Board permission un-

der this order for the following kinds of construction: * * *

(6) Construction owned by the United States Army, Navy, Maritime Commission, War Shipping Administration, Coast Guard, Marine Corps, Civil Aeronautics Authority, Coast and Geodetic Survey, or Panama Canal.

* * * * *

(e) *All other construction forbidden without WPB permission.* No person shall do any construction which has not been permitted by the War Production Board, unless it is of a kind described in paragraph (c) or (d) above. This prohibition applies to a person who does his own construction work, to one who gets a contractor to do it for him, and to any contractor or subcontractor who works on the job or gets others to work on it. It also applies to any supplier who furnishes material for the job if he knows or has reason to know that the construction has not been permitted.

(f) *How to apply for permission.* (1) Schedule C at the end of this order shows the various types of application forms, and where they should be filed. * * *

* * * * *

Schedule C

Application forms to be used in obtaining permission to begin construction under L-41 and where to file them, unless otherwise in-

structed. These forms are to be used whether or not priorities assistance or controlled material allotments are required.

Types of Construction	Application Form	Where filed
* *	* *	*
All other kinds of construction: * * * Total cost $10,000 or more.	WPB–617 (formerly PD–200)	WPB, Washington, D. C.

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